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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/591,570	04/26/2007	Frans Witteveen	207,802	6231
38137 7590 10/21/2010 ABELMAN, FRAYNE & SCHWAB 666 THIRD AVENUE, 10TH FLOOR NEW YORK, NY 10017				
EXAMINER				
SHOMER, ISAAC				
ART UNIT		PAPER NUMBER		
1612				
MAIL DATE		DELIVERY MODE		
10/21/2010		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.

10/591,570

Applicant(s)

WITTEVEEN ET AL.

Examiner

ISAAC SHOMER

Art Unit

1612

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 27 August 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 21-37 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 21-37 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/C)
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date: _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____
- Paper No(s)/Mail Date: _____

DETAILED ACTION

Applicants' arguments, filed 27 August 2010, have been fully considered. Rejections and/or objections not reiterated from previous office actions are hereby withdrawn. The following rejections and/or objections are either reiterated or newly applied. They constitute the complete set presently being applied to the instant application.

Claim Rejections - 35 USC § 103

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 21-25 and 27-37 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Skelbaek et al. (WO 91/17821).

In applicant's arguments dated 27 August 2010 (hereafter referred to as applicant's arguments), applicant contends that examiner is "cherry picking" pieces of information from Skelbaek in an attempt to reconstruct all of the integers of applicants' claims, as of applicant's arguments, page 2, fourth paragraph. Applicant argues that examiner has taken the disclosure of hydrogenated castor oil out of context, as hydrogenated castor oil is used as a spraying agent in Skelbaek, whereas it has a different use in the instant invention, as of applicant's arguments, page 2, sixth paragraph. Applicant argues that in Skelbaek, page 2, second to last paragraph. Applicant argues that the fact that the claimed invention employs a fat and not a wax as

dispersed in the matrix material yields significant results, and applicant cites comparative Example 1 and Example 4 in the specification.

In response to applicant's arguments that examiner is "cherry picking" elements from Skelbaek, the examiner notes that the entire disclosure of Skelbaek is prior art, and not just the preferred embodiments. See MPEP 2123.

In response to applicant's argument that the fact that hydrogenated castor oil (the fat component) is used as a spraying agent in Skelbaek, it appears as if applicant is arguing that a spraying agent is not really part of the matrix. The examiner is unaware of any basis for this contention. Furthermore, applicant has argued that the hydrogenated castor oil in Skelbaek performs a different function than the claimed fat. This argument is not persuasive because the claims do not recite a function for the fat. Furthermore, the claims do not require that a triglyceride (or sucrose polyester of a fatty acid) be dispersed in a gelatine matrix. The claims require the presence of a triglyceride or sucrose polyester of a fatty acid, as well as a fat dispersed in a gelatine matrix, but do not require that the dispersed fat is a sucrose polyester of a fatty acid.

The examiner disagrees with applicant's contention that the spraying agent would not have been dispersed in the particles. The examiner points to Skelbaek, page 11 last paragraph, wherein emulsion drops were transferred with spraying agent to a fluidized bed, followed by drying. A similar procedure was used in the other examples of Skelbaek. This appears to result in the emulsion particles and the spraying agent being dispersed together. Furthermore, Skelbaek does not require that the fat that is selected from triglycerides or sucrose polyesters of fatty acids be dispersed in the matrix, but

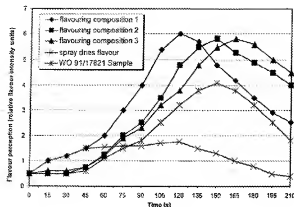
merely that "fat" be dispersed in the matrix. In Skelbaek, Example 2, page 6 last paragraph, coconut oil containing C8-C10 fatty acids is dispersed in the matrix.

Applicant also alleges that the difference in performance using a fat and a wax is significant. The data relied upon compares a formulation of the present invention with a formulation of Skelbaek, as of page 17, Table 2, and page 18, Table 3 of the specification, which is reproduced below.

flavouring composition	1	2	3	Spray dried flavouring composition	controlled release particles of WO 91/17821
gelatine 240 (wt%)	59	40	22	2 wt% water	1 wt% water
Xylitol (wt%)	18	14	8	38 wt% Capsul	73 wt% gelatine 240
Gum Arabic (wt%)	3	4	2	40 wt% Malto Dextrine MD20	6 wt% carnauba wax
Water (wt%)	2	2	2	20 wt% Menthol 20	20 wt% menthol
Menthol (wt%)	20	35	50		
PC58 (wt%)	3	70	46		

In the table above, it appears that flavouring compositions 1-3 are inventive examples, and that the spray dried flavouring composition and that of Skelbaek are non-inventive examples. This determination in regard to the spray-dried flavouring composition is made in light of the fact that it does not include gelatin and is outside the scope of the claims.

Applicant also presented data showing the differences between flavor perception of the above compositions, as of Figure 1, reproduced below, and page 18 lines 4-14 of the specification.



The examiner acknowledges that the data above shows that there appears to be an improvement in maximum flavor intensity in applicant's inventive composition as compared with the non-inventive examples (the spray dried flavour and the sample from WO 91/17821), though it is unclear whether this improvement is statistically significant. The data also may show that the inventive compositions may have a more prolonged release of flavourant, yet flavour intensity was measured for only 210 seconds (3 minutes and 30 seconds), and the data does not show what happened beyond that length of time.

If, purely *en arguendo*, the results presented by applicant are unexpected, then the claims are not commensurate in scope with the showing. See MPEP 716.02(d). The table below sets forth the differences between applicant's claims and the data presented.

Claim 1	Applicant's Examples
A flavoring	Menthol
A fat selected from triglycerides, sucrose	Palm Oil (known by the trade name PO58)

polyesters of fatty acids with a melting point of at least 35 C	
A film forming carbohydrate	Gum Arabic
Carbohydrate plugging material	Xylitol

In this case, there is no evidence to support that any fat other than palm oil, any film forming carbohydrate other than gum arabic, and any carbohydrate plugging material other than xylitol would have had the desired effect. In applicant's example, applicant uses xylitol as the carbohydrate plugging material and gum Arabic as the film forming carbohydrate. Applicant's data does not demonstrate that the unexpected effect would occur with any other film forming carbohydrates and/or carbohydrate plugging material, and thus the claims are not commensurate in scope with the showing presented. In applicant's example, applicant uses palm oil as the fat. Applicant's data does not demonstrate that the unexpected effect would occur with any other fat. For example, applicant's data does not demonstrate that the same effect would occur with triglycerides containing primarily unsaturated fats.

Claim 26 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Skelbaek et al. (WO 91/17821) as applied to claims 21-25 and 27-37 above, and further in view of Venema et al. (EP 0839516 A1).

In applicant's arguments, applicant contends that claim 26 cannot be obvious because it depends upon claim 21, which is not obvious, as of applicant's arguments, page 3. In response, claim 21 is obvious, for the reasons set forth above, and as such claim 26 is obvious as well.

Conclusion

No claim is allowed.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to **ISAAC SHOMER** whose telephone number is (571)270-7671. The examiner can normally be reached on 8:00 AM - 5:00 PM Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Frederick F. Krass can be reached on (571)272-0580. The fax phone

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number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/ISAAC SHOMER/
Examiner, Art Unit 1612

/Frederick Krass/
Supervisory Patent Examiner, Art Unit 1612